COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: (019513)

In the matter between:

LINPAC PLASTICS (SA) PTY LTD	First Plaintiff
alternately	
ATLANTIC FORMING (PTY) LTD	Second Plaintiff

and

JACOBUS PETRUS HENDRIK DU PLESSIS	First Defendant
JUDEX BURNETT	Second Defendant

In re:

The High Court Civil Proceedings between:

LINPAC PLASTICS LTD	First Plaintiff
LINPAC PLASTICS (SA) (PTY) LTD	Second Plaintiff
ATLANTIC FORMING (PTY) LTD t/a LINPAC DISTRIBUTION	Third Plaintiff
ANKER MANUFACTURING (PTY) LTD	Fourth Plaintiff

and

JACOBUS PETRUS HENDRIK DU PLESSIS	First Defendant
JUDEX BURNETT	Second Defendant
WAILSBACK TRADING LTD	Third Defendant
JPH DU PLESSIS and CA VAN DER MERWE N.N.O.	

In their capacities as trustees of
THE ANCRE INVESTMENT TRUST Fourth Defendant

Panel	:	Norman Manoim (Presiding Member) Andiswa Ndoni (Tribunal Member) Mondo Mazwai (Tribunal Member)
Heard on	:	29 September 2014
Reasons and order issued on	:	06 November 2014

REASONS: POINT IN LIMINE

INTRODUCTION

1. This matter has been referred to us by the Western Cape High Court at the instance of one of the defendants in a civil matter before it. The defendants in the High Court case contend that one of the issues in that case is whether the plaintiffs, who are claiming damages from them, can do so because they were allegedly engaged in conduct that is anticompetitive. Because the High Courts are precluded from determining whether particular conduct contravenes the Competition Act, Act 89 of 1998 (the "Act"), as this is a matter subject to the exclusive jurisdiction of the competition authorities, the issue has been referred to us to determine.[1]

2. However, prior to us determining that matter on its merits we have to decide a point of law raised by the plaintiffs in the civil case, who are the parties against whom allegations of anticompetitive conduct have been made by the defendants. The plaintiffs argue that the referral has been made too late and that all matters before the Tribunal are subject to a prescription period set out in the Act which limits the right to refer complaints that are brought out of time.[2]

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[1] By 'competition authorities' we mean the Competition Tribunal ("the Tribunal") and the Competition Appeal Court ("the CAC"). The exclusive jurisdiction arises from the provisions of section 62(1) of the Act which states that the competition authorities share exclusive jurisdiction in respect of the interpretation and application of Chapters 2, 3 and 5 of the Act.

[2] Section 67(1), the terms of which are set out below.

3. The defendants argue that the limitations clause does not apply to referrals from the High Court, only to complaint procedures, the latter being brought under different provisions of the Act.[3]

4. Since it is common cause on the facts that if the prescription period applies the claim is barred, the only issue we have to decide is whether the legal point is good.

5. For ease of reference we will continue to refer to the plaintiffs in the High Court civil proceedings as the "plaintiffs" and the first and second defendants in the High Court matter as the "defendants" despite this not being the correct term for describing them in the current matter.[4]

6. We start by briefly setting out the facts in the High Court matter after which we consider the respective legal arguments advanced by the parties.

BACKGROUND

7. The defendants were both variously employed by companies in the plaintiff group as directors. They were, whilst so employed, party to restraint of trade agreements preventing them from competing with their employer. According to the plaintiffs' particulars of claim, in breach of the restraints and their duties as directors, the defendants formed a rival company called Lion Packaging (Pty) Ltd which competed with the plaintiffs[5]. The plaintiffs allege that this activity was unlawful, being both a breach of the restraint of trade and their fiduciary duties as directors. The plaintiffs allege they suffered loss as a result and are claiming damages in the amount of R 187 million jointly and severally from the defendants.

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[3] Section 49B read with sections 50 and 51 of the Act, as discussed more fully below.

[4] The plaintiffs in the civil suit are the respondents in the referral to the Tribunal and the excipients in the present objection application. The defendants in the civil suit are the claimants in the referral and the respondents in the objection application. Hence referring to them by their status in the High Court matter is simpler.

[5] Linpac Plastics business.

8. The defendants denied liability and in their initial plea, filed in December 2007, raised defences that do not concern us now as they do not implicate the Act.[6] However both filed amended pleas in 2011.[7] In terms of identically framed clauses in their respective amended pleas, the defendants alleged that the plaintiffs, if they had suffered damages, were not entitled to recover them as the turnover on which the damages were premised was *"...achieved as a result of the plaintiffs unlawful conduct".*[8] They relied for the fact that the conduct was unlawful by alleging that it contravened various provisions of the Act. They alleged that the plaintiff firms had been engaged in cartel activities with various other firms in the packaging and plastic film industry and hence their profits were a result of unlawful activity, more specifically that they were in contravention of section 4(1)(b)(i) and (ii) of the Act which relate to price fixing and market division respectively. (In the complaint referral the defendants allege they had personal knowledge of such activity, as they represented the plaintiffs at the time in meetings whose subject matter was collusive).[9] In addition, they allege that insofar as the plaintiffs alleged that their turnover had been reduced, this was a consequence of the plaintiffs engaging in what is frequently termed "predatory pricing" i.e. pricing below their marginal or average variable cost in contravention of section 8(d)(iv) of the Act.[10] They intend to rely on past authority that suggests that damages that flow from unlawful activity, cannot be the subject of a delictual claim.[11]

9. The High Court, as we discuss more fully later, does not have jurisdiction to determine whether conduct contravenes the Act, but does have the power to refer such an issue raised in the course of its proceedings to the Tribunal in terms of section 65(2) of the Act.

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[6] This at least is how the plaintiffs characterise the initial pleas. See heads of argument paragraph 9.

[7] On 29 April 2011 (Du Plessis) and 03 May 2011 (Burnett).

[8] Paragraph 16 of Du Plessis' and paragraph 7 of Burnett's amended pleas.

[9] See Complaint referral, paragraphs 9 - 18

[10] Since this decision only relates to the preliminary legal point on prescription the merits of the dispute are not discussed.

[11] See *Law of Delict*, Neethling, Potgieter and Visser, Fourth Edition, Butterworths page 240 and footnote 257. We express no view on this aspect as civil damages are a matter for civil courts in terms of the Act. See section 62(5) read with section 65(6)(b).

10. The defendants duly invoked the provisions of section 65(2)(b) of the Act and sought an order from the High Court referring the issue of whether the plaintiffs had contravened the Act to the Tribunal. The High Court did so on 24 October 2011 – it seems that this order was granted by consent. In terms of the High Court order the defendants were given 20 business days to file a complaint referral with the Tribunal.

11. After the referral was filed with the Tribunal on 18 November 2011, the plaintiffs filed an answering affidavit raising the preliminary objection that we now consider. The plaintiffs allege that the referral by the High Court and subsequently the filing of the complaint referral with the Tribunal, had both occurred more than three years after the prohibited practice alleged in the plea had ceased.

12. Both parties are agreed on this fact.

13. The specific point upon which they disagree is whether this should disqualify us from hearing the referral because of the limitation on proceedings provision contained in section 67(1) of the Act.

14. In terms of section 67(1) of the Act:

"A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased."

15. There is no legal dispute between the parties that this limitation of bringing an action, as it is described in the Act, applies to complaint referrals in terms of the complaint procedures set out in section 49B read with sections 50 and 51 of the Act. To avoid prolixity we refer to this procedure from now on as the "complaint referral" procedure. The question in this case is whether it also applies to a section 65(2)(b) referral. Again, to avoid prolixity, we will refer to this latter process, since it has its genesis in a High Court order, as the "court referral" procedure.

16. Let us consider the respective arguments.

(i) The Plaintiffs' argument

17. The plaintiffs argue that section 67(1) applies equally to a court referral and that accordingly, on the common cause facts, the matter has prescribed. They argue that despite the fact that section 65(2)(b) creates a distinct entry point to the Tribunal system (a referral from the Court rather than via a complaint to the Commission in terms of section 49B) there is no warrant, either in the language of the Act or its policy, to exempt such referrals from the normal consequences that attach to complaint referrals. Since one of those consequences is prescription it should on this logic also apply to court referrals. A past decision of the Tribunal appears to favour this approach.[12]

18. We consider this argument in greater detail later in this decision.

(ii) The Defendants' argument

19. The defendants argue that section 67(1)'s language must be given its ordinary meaning. If it is, it clearly excludes its application to court referrals because the provision refers to the act of initiating a complaint. Neither the act of initiation nor the concept of a complaint, are words used in section 65(2)(b). This is an opportune time to set out the language of that provision.

20. In terms of section 65(2) of the Act:

> (2) *If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and –*
>
> *(a) if the issue is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or*
>
> *(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that -*

[12] *Leonard & others v Nedbank & others* [2008] JOL 22212 (CT) (hereinafter "*Leonard*").

(i) *the issue has not been raised in a frivolous or vexatious manner; and*

(ii) *the resolution of that issue is required to determine the final outcome of the action.*

21. Secondly, the defendants argue, the court referral is in essence a form of conduit of the case pending before the High Court. The Tribunal is called upon to determine a specific issue referred by the High Court and to send it back. Once referred, the Tribunal has no business to decide that prescription applies and send the matter back without determining the merits.

22. Thirdly, that once a High Court refers a matter the Tribunal has no jurisdiction to not consider it otherwise this would involve an administrative Tribunal not implementing an order of court.

23. Fourthly, in this case the defendants are not invoking section 65(2) to commence a claim, but rather to use the Act to defend itself against the plaintiffs' claim. Prescription at common law it is argued, can be used to blunt the sword but not to thwart the use of a shield. In this case it is argued the defendants are relying on unlawfulness under the Act not to assert a claim, but to defend themselves from a claim of damages, which in the public interest they ought not to be liable for.

ANALYSIS

24. At the outset it is important to understand why a matter in the High Court which involves a suit in civil law, arrives at the Tribunal. In terms of the Act a consideration of the substantive competition issues raised by conduct is exclusively reserved for the Tribunal and the Competition Appeal Court.[13] This is because the legislature wanted a single jurisprudence on competition matters to emerge from specialist institutions, and constituted them into a single hierarchy.

[13] Section 62(1). See as well *Astral Operations Ltd v Nambitha Distributors (Pty) Ltd* [2013] 4 All SA 598 (KZD) paragraph 8.

25. Jurisdiction of the competition authorities is in turn limited under the Act to competition issues and not to broader common law issues. As a theoretical matter the boundaries of jurisdiction can be easily understood. As a practical matter deciding on which side of the border a dispute should be decided is more difficult. A commercial dispute between parties can at the same time raise both common law and competition law issues. This created a dilemma, how could one dispute be resolved if its component parts were the subject of determination by different adjudicators who could not tread across their respective boundaries. A contract could be lawful and hence enforceable by a civil court in common law but be unlawful and not enforceable by way of a competition authority decision in terms of the Act.

26. To resolve this problem the legislature created two options in terms of section 65(2). The first option (65(2)(a)), is for the court to apply any order that the competition authorities had already made on the issue in question. Where the competition authorities had not, the second option for the court, under sub-paragraph (b), and the one we are concerned with in this case, is to refer the issue to the Tribunal to be decided on its merits. This latter option is subject to two caveats; that the issue has not been raised in a frivolous or vexatious manner and that its resolution is required to determine the final outcome of the case.

27. But as noted, the court referral process is not the only route by which cases of prohibited conduct get referred to the Tribunal. The more conventional is the complaint procedure route. Here, as noted before in many decisions, a complaint can come to the Tribunal either at the instance of the Commission (acting on a complaint from a complainant or at its own instance), or from a complainant directly, where the Commission has non-referred a complaint.

28. In all these three instances the Commission serves as the gatekeeper of the system. It must first investigate the complaint and then, if it decides to refer the complaint, it has the preferential entitlement to prosecute it, even if acting on a complaint from a complainant.

29. By way of contrast, in the court referral process the matter comes straight to the Tribunal and bypasses the Commission. It forfeits its entitlement to be investigator and prosecutor of first instance. Indeed, the Act gives it no role at all. The presence of the Commission in the complaint referral process and its absence in the court referral process, is significant. The former can be thought of as arriving through the front door, with the Commission present as gatekeeper, the latter through the side door, where the gatekeeper is avoided.

30. In both types of cases the Tribunal is engaged in the same adjudicative exercise, determining whether prohibited conduct has been established. This is not in dispute. What is in dispute is the extent to which the other consequences which attach to a complaint referral apply to a court referral, more specifically the limitation on bringing actions set out in section 67(1).

(iii) The ordinary language approach

31. We set out again section 67(1) but this time we underline the key words on which the interpretive dispute turns.

> *"A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased." (Own emphasis)*

32. The underlined words "complaint" and "initiate" are words found in the complaint referral proceeding. There are repeated references to them. However, there is no reference to either in section 65(2)(b), it simply uses the term "refer".

33. The defendants argue that the specific use of this language suggests that their interpretation is correct. If the legislature had intended that the section 65(2)(b) referral would be subject to section 67(1) the choice of language of the latter provision would have been different. Section 67(1) can only be sensibly interpreted if one had a complaint that had been initiated. It makes no sense applying either the notion of complaint or initiation to section 65(2)(b), which contemplates neither.

34. Trying to read this language to accommodate the court referral, as the plaintiffs attempt to do, they argue, is to do drastic surgery to the ordinary meaning of the language of section 67(1).

35. The riposte of the plaintiffs is that the words "complaint" (as opposed to complainant) and "initiate" are not terms defined in the Act and are sufficiently supple to have different meanings in terms of different sections of the Act.

36. Whilst there is some appeal to an argument that eschews linguistic formalism for the sake of it, the use of the terms "initiate" and "complaint" whilst not defined in the Act, are nevertheless very much part of complaint procedure language and as noted are not used in section 65(2). If the matter has to be decided solely on the matter of the ordinary language used, then the defendants presents a more convincing argument for their interpretation viz. that section 67(1) does not apply to the court referral process.

(iv) The functional approach

37. But the interpretive argument goes further than the mere choice of language. Section 67(1) contemplates the existence of two dates. The first date is purely factual – it is the date on which the conduct ceases. But the date on which the period of three years ends, the date of initiation, is both a legal and factual matter. This end date has to be susceptible to determination. In the case of complaint referral proceedings the relevant date is the date the complaint is initiated; i.e. either the date on which the complainant submitted the complaint to the Commission or the date on which the Commission, if it is the complainant, commenced its investigation. Section 67(1)'s choice of language clearly has this procedure in mind.

38. However, applying the same logic to a section 65(2)(b) referral is more difficult. What is the end date here since no complaint has been '*initiated*' in the ordinary sense that we understand this term. Is it the date that the party in the High Court which raises the competition issue pleads it, the date the court refers the issue to the Tribunal in terms of section 65(2)(b) or the date that the complaint referral

affidavit, pursuant to the court referral, is filed with the Tribunal? Counsel for the plaintiffs initially said it was the date of the court referral order, but then revised his position and said it was the date the referral is filed with the Tribunal, which would be the latest possible of the three mentioned. However none of these three possible candidates for the date of initiation in the court referral system, recommends itself as an appropriate analogue to the complaint initiation in the complaint referral system, where the decisive date, has some utility as it marks the commencement of the investigation period. This highlights the difficulty of panel beating section 67(1)'s language to fit the purpose that the plaintiffs seek to advance. Thus the limitation of their approach is evidenced by the fact that they not only have to stretch the language of the provision, but also its logic.

39. There is a final interpretive argument that section 67(1) does not apply and that is that the language of section 65(2) refers to "*conduct that is prohibited*". The legislature did not use the term "*prohibited practice*". "*Prohibited practice*" is a defined term in the Act and refers to conduct referred to in Chapter 2 of the Act. However, the choice of the term *conduct* as opposed to *practice* contemplates something wider than the contraventions contained in Chapter 2, including, for instance, contraventions of Chapter 3 of the Act that deals with mergers. Whilst Chapter 2 contraventions can be the subject matter of complaints, because they concern prohibited practices, it is difficult to shoehorn other contraventions of the Act, that are not included in Chapter 2, into the kind of complaint contemplated by section 67(1). This again appears to indicate that the legislature did not contemplate that section 67(1) would apply to section 65(2).

(v) The policy approach

40. However the burden of the plaintiffs' argument was not dependant on demonstrating that the language of section 67(1) favours their position, but rather that it should not be read so narrowly as to exclude it. Instead, they stake the burden of persuasion on a policy argument which they contend is sufficiently powerful and logical to allow the porous language of section 67(1) to permit it, without the necessity of having to take too much linguistic licence.

41. The plaintiffs argue that the schema of the Act is about adjudication of conduct that has public not merely private consequences. This is replete throughout the mechanisms of the Act from the way complaints are entertained to the manner in which they are disposed of through remedies. Every part of the system is public in nature. If this is so, why should there be a special carve-out for the court referral procedure, without this exception being made explicit in the Act, which, they argue, it is not. What is it about that procedure, other than its genesis that should exclude it from this public aspect? Nothing, they argue, and hence if court referral cases are to have similar remedial outcomes to complaint referral cases, then it is only logical and sensible that they are subject to the same limits on bringing actions and accordingly section 67(1).

42. There is much force in this argument. The schema of the Act is largely concerned with public enforcement. Competition regulation is at its essence the public regulation of private market conduct. However, this does not exclude the possibility for a private aspect to co-exist as well without subverting the statutory design of the Act and its institutions if there is an equally compelling policy reason for doing so.

43. As we discuss below there is one.

44. We explained earlier the exclusive jurisdiction choice of the legislature over substantive competition issues imposed constraints on a civil court's latitude to determine private disputes before it. The solution was section 65(2)(b), a mechanism for allowing the competition aspect of the private dispute, under certain conditions, to be "diverted" to the Tribunal for adjudication. This does mean the Tribunal becomes involved in purely private matters – true a departure from the rest of the model in the Act which is public in nature – but this departure was necessary to preserve another fundamental policy choice and that was to keep the Tribunal and the CAC as the repositories of the specialist jurisprudence on substantive competition issues, so it developed in a uniform and more coherent form, than if it were subject to possible conflicting interpretations of different divisions of the civil courts.

45. However the most powerful indicator that the section 65(2)(b) procedure contemplates a purely private model is the absence of the requirement to have the Commission as the investigator and default prosecutor of complaints as it is for complaint matters. The clear omission of the Commission from this process - something quite clear from the legislation - has important implications and which, as the facts of this case illustrate, are more than theoretical.

46. The present dispute revolves around the existence of an alleged cartel implicating several firms and is not confined to the plaintiffs. Were this a complaint made to and prosecuted by the Commission, the other firms implicated would doubtless also be respondents and subject to the public law remedies the Act provides and also follow on civil actions.

47. In the present case the choice of respondent is defined by the nature of the civil suit and is limited to the plaintiffs, since they are the only alleged cartelists party to the civil suit in *casu*. This highlights the distinctly private nature of the court referral suit in contrast to the public nature of the complaint referral procedure. Because the private dispute is circumscribed – it only implicates those litigants who are party to the civil action - it cannot involve any other firms who are not parties, even when, as in the case of a cartel, there may be other firms who are involved in the alleged prohibited practice that formed the basis of the referral.[14]

48. Of course this has implications for the kinds or remedies that the Tribunal can impose as an outcome of this procedure as opposed to the section 49B or public procedure. It would appear that the logical extension of this approach is that the Tribunal is limited to the order identified by the court that is necessary for the purpose of deciding the civil suit. In this case it entails a declaration. In other cases it might entail the vitiating of a term of a contract.[15]

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[14] In this case the defendant implicates several other firms that are parties to the alleged cartel agreement, but they are not cited as respondents in the complaint referral as they are not litigants in the civil action.

[15] Section 65(1) provides that: (1) "Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void".

49. The logic of our approach is that all other public consequences that ordinarily attach to the determination that a prohibitive practice has occurred do not apply.

50. What this means is that apart from the Court required remedy, which would be limited to one "required to determine the final outcome of the civil action" no other remedies or consequences which would ordinarily attach to the outcome of the public process would apply. This includes the range of other remedies including administrative penalties.

51. A further indication that section 65(2)(b) contemplates a private process is that the Act does not provide for third parties to participate in this type of proceeding. This is in contrast to complaint referral proceedings where these rights, albeit in limited circumstances, are allowed. In terms of section 53(1)(a)(iv), a third party is given rights to participate in complaint hearings in terms of Part C. Part C here refers to complaint procedures which are located in that part of the Act, as opposed to section 65(2)(b), which is not. If third parties have rights in the former, but not the latter, it indicates the public nature of the former and the private nature of the latter, this too would be consistent with our conclusion about the other indicators of the private nature of the court referral procedure.

52. The plaintiffs also raised two further arguments based on other sections of the Act which they argued supported their reading of section 65(2) as a component of a public process.

53. They point out that in terms of section 65(2)(a), if the Tribunal has already made an order in respect of the issue to be referred to it, the civil court must apply that order. Since this prior order must have been the outcome of a section 49B referral, and hence the product of the public process, section 65(2)(b), should, for the sake of consistency, be construed as public as well.

54. However we do not believe that this inference is correctly drawn. The purpose of section 65(2)(a) is to avoid a further determination of an issue that has already been decided. It does not follow that because sub-paragraph (a) refers to the civil

court recognising the outcome of a past process that was public in nature that the future process in terms of sub-paragraph (b) must be as well. An attempt to avoid redundancy under sub-paragraph (a) should be read as limited to this objective and not to transform sub-paragraph (b) from a private to public process.

55. The plaintiffs further argue that section 58, which is the section that provides for Tribunal orders, appears to elide the section 65(2)(b) process with the public process. For instance section 58(1)(a)(v) states that one of the orders that it is competent for the Tribunal to grant is an order " ... *declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65".* Since a declaratory order is what is sought in this matter, and section 65 is the foundation of the civil action, this would suggest a reading that the granting of a declaratory order is always public in character, since the claim for civil damages located in terms of section 65 is public in nature as it can be sought not merely by complainants, but by any person.

56. Were section 58(1)(a)(v) the only source of the Tribunal's powers to grant an order as contemplated in section 65(2)(b) this argument might assist the plaintiffs' contention. However Section 58(1) commences with the phrase *"In addition to its other powers in terms of the Act..."* It is clear from this that the powers set out in section 58 are supplementary to and not exhaustive of the powers of the Tribunal. This is perfectly consistent with our reading of section 65(2)(b) as imbuing the Tribunal with an independent power to issue a declaratory order. This then is not a declaratory order for the purpose of section 65, i.e. one foundational to the right to bring a civil claim by a person injured, rather it is a declaratory order solely for the purpose of section 65(2). The Tribunal does not need to rely on section 58(1)(a)(v) to exercise this power. It would only need to do so if all its powers were solely derived from section 58, which manifestly they are not. It follows then that an order given under section 65(2)(b) would not qualify as an order to found a civil claim contemplated by section 65(6).

57. The plaintiffs have further argued that the limitation of actions contemplated by section 67(1) prevents scarce public resources being wasted on investigating

conduct that has been discontinued sometime in the past. We have said this much in past decisions in relation to the Commission.[16]

58. However since the Commission is bypassed in the section 65(2)(b) process, its investigative and prosecutorial resources are not called upon, and it is only the resources of the Tribunal or, if appealed, the CAC, which must be expended in this way. Whilst conservation of adjudicative resources is also important it must sometimes yield to the other policy imperatives of the system to resolve disputes.

59. Of course it can be argued that limiting actions as section 67(1) does, serves as an important filter against the raising of opportunistic claims in civil matters to prolong them. The argument goes that if the allegation that there has been an infringement of the Act had substance, it would have been timeously made as a complaint under the Act. There is a further argument that prescription serves a useful purpose by excluding from adjudication events that took place so long in the past that evidence has become unreliable.[17]

60. Whilst there is some merit in this argument one must guard against overstating the concern. Not every party which raises a competition issue for the first time in a civil matter, but did not do so by lodging a complaint with the Commission within the time periods set out in the Act, can be susceptible to criticism for acting opportunistically. There may be perfectly valid reasons for the party not lodging a complaint timeously, not the least of which is that they did not at the time know they would be facing civil liability in respect of allegedly anticompetitive conduct. But we should not lose sight of the fact that the proper filter against opportunistic claims is the civil court which is responsible for the referral in terms of section 65(2)(b). The court has the discretion to screen out requests for a referral if they are frivolous or vexatious. The court also has the discretion to determine whether the resolution of the issue is likely to be determined by the resolution of the competition issue. The longer the period between the *lis* in the High Court and the

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[16] *Competition Commission v Loungefoam (Pty) Ltd* [2010] 1 CPLR 174 (CT) at paragraph 54.

[17] See for instance *Road Accident Fund and the Minister for Transport v Vusumzi Mdeyide* CCT 10/10 [2010] ZACC 18 , at paragraph 8 and the authorities relied on there in footnote 10.

date on which the practice ceased, the less likely it is that the determination of the competition issue will resolve the *lis* before the court and hence the less likely that a court can be persuaded to refer the issue in terms of section 65(2)(b).

61. The approach taken by the court in *Astral,* in which it refused an application to refer, illustrates that the courts, especially since over time we have had more experience with the Act and developed its jurisprudence, will not lightly refer a matter if this threshold is not met.

62. Against this view of using section 67(1) to resist opportunistic claims is a policy argument advanced on behalf of the defendants for saying that plaintiffs in civil matters should not be able to claim damages for gains made unlawfully, because of the limitation on claims imposed on claimants. If one is adopting a purely policy based approach to interpreting section 67(1) then this counter argument for how it should be read is of equal validity.

63. Further, this interpretation by the defendants is also bolstered by a reading in of the constitutional right of access to courts, contained in section 34 of the Constitution[18] which states:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate another independent or impartial tribunal".*[19]

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[18] The Constitution of the Republic of South Africa, Act 108 of 1996.

[19] In *Brummer v Minister for Social Development and Others* [2009] ZACC 21 Ngcobo J held as follows: *"The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The 'enquiry turns wholly on estimations of degree'. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time*

64. By denying a claimant in civil law the benefit of defence based on prescription one is potentially constraining this right as our courts have recognised in *Mohlomi*.[20] A reading of section 67(1) as constraining only the public right to bring a complaint and not the private right to raise it in civil matters, where the courts are already limited from applying the provisions of the Act by operation of section 62(1), constitutes a fair balancing of competing rights, consonant with a respect of the constitutional right of access to justice.

65. We have in these reasons departed from an approach taken in an earlier decision of *Leonard*. The arguments raised in this matter were not raised in *Leonard* and hence not considered. That case turned around the point whether we could consider the issue of prescription because the matter had been referred by the Court and we found that we could. However the argument that section 67(1) should be construed as having limited application to complaint referrals is a novel one, and hence in this matter, and, after having had the benefit of further experience in applying the Act, we consider the correct approach.

66. In summary the approach taken by the plaintiffs finds no support in the ordinary language of the Act. Furthermore its argument that a policy based approach supports their interpretation is also incorrect if one properly appreciates the limited purpose of the section 65(2)(b) process which itself is premised on a policy to preserve substantive competition jurisprudence for the consideration of the competition authorities and the distinction this has necessitated between the public and private nature of complaint and court referral procedures. Finally the plaintiffs' interpretation would result in an unjustifiable limitation of a person's right of access to the courts.

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during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive".

[20] *Mohlomi v Minister of Defence* 1996 ZACC 20.

67. In conclusion we find that section 67(1) does not operate to exclude a referral made in terms of section 65(2)(b) and must be read to be limited to proceedings initiated pursuant to section 49B.

68. The point in limine is therefore dismissed.

COSTS

69. In the ordinary course costs would have followed the outcome. However in this case we find that the plaintiffs acted reasonably in raising the point in limine.

70. In the first place the legislation as we have noted is not clear on this point and the plaintiffs' interpretation, whilst we have disagreed with it, is not unreasonable.

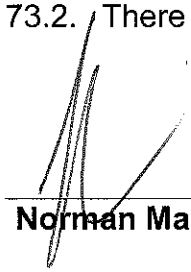
71. Secondly, and more importantly, the plaintiffs were entitled to rely on a past decision of ours in *Leonard* where their argument had been accepted.

72. Whilst we have departed from the reasoning of that decision because arguments raised in this case were not considered then, there is no reason for the plaintiffs to be burdened with this change in approach. Indeed we have benefitted from their contribution to the debate.

73. For this reason we make no order as to costs and each party will have to pay its own costs.

73.1 The point in limine is dismissed

73.2. There is no order as to costs.



Norman Manoim

06 November 2014
Date

Andiswa Ndoni and Mondo Mazwai concurring

Tribunal Researcher	: Ipeleng Selaledi
For the Plaintiffs	: Adv. J. Wilson and Adv. N. Farooqui instructed by Webber Wentzel Attorneys
For the Defendants	: Adv. R.S. Van Riet SC and Adv. S.A. Jordaan SC instructed by Minde Schapiro & Smith Inc.